Petition

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

81-270

No. _____

In the Supreme Court of the United States

October Term, 1981

ALLEN MANSFIELD,

Petitioner,

v.

SECURITIES INVESTOR PROTECTION CORPORATION, EDWIN M. LAMB, TRUSTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the Securities Exchange Commission is the plaintiff on the caption of proceedings to liquidate to liquidate an insolvent broker-dealer under the Securities Investor Protection Act of 1975, does any party to the proceedings have sixty (60) days rather than thirty (30) days to file a notice of appeal because an agency of the United States is a party for purposes of Rule 4(a) of the Federal Rules of Appellate Procedure?

2. In the alternative, does a party's reason for failure to file a notice of appeal within thirty (30) days after entry of judgment constitute "excusable neglect" pursuant to Rule 4(a)(5) of Federal Rules of Appellate Procedure where the trial attorney notified his client by letter that his engagement does not include an appeal and the client does not receive the letter informing him of the applicable time limits until after the thirty (30) day period set forth in Rule 4 (a)(1) has expired?

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In the Supreme Court of the United States

October Term, 1981

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ALLEN MANSFIELD,

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v.

SECURITIES INVESTOR PROTECTION CORPORATION, EDWIN M. LAMB, TRUSTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI

LIST OF PARTIES

The parties designated in the caption of this petition were all the parties to the proceeding before the United States Court of Appeals for the Ninth Circuit. In the United States District Court for the Central District of California, the Securities Exchange Commission was denominated as plaintiff and Pacific Western Securities, Inc., was the defendant. Petitioner Mansfield was a claimant, and respondent Securities Investor Protection Corporation was designated as applicant. The Securities Exchange Commission was listed on the caption of all papers in the district court proceedings.

OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Ninth Circuit, granting respondents' motion for summary disposition and awarding respondent costs on appeal is reproduced as Appendix A to this petition. The Ninth Circuit's interim order of September 29, 1980, is appended as Appendix B. The order of the United States District Court for the Central District Court for the Central District of California denying petitioner's motion for an extension of time to file his notice of appeal is reproduced as Appendix C. Petitioner's moving papers are attached as Appendix D.

JURISDICTION

The judgment (order) of the United States Court of Appeals for the Ninth Circuit was filed on May 12, 1981. This petition for writ of certiorari has been filed within 90 days of that date as specified by 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The issue of whether petitioner Mansfield's notice of appeal was timely within the 60-day period specified by Rule 4(a) of the Federal Rules of Appellate Procedure was expressly passed upon by the Ninth Circuit in its interim order of September 29, 1980 (Appendix B). An order denying an extension of time to file a notice of appeal is appealable. *See Chipser v. Kohlmeyer and Co.*, 600 F.2d 1061 (5th Cir. 1061); 9 *Moore's Federal Practice*, ¶ 204.13[4], at 4-107 n.1.

STATUTES INVOLVED

15 U.S.C. § 78fff provides in relevant part:

"(c) Application of Bankruptcy Act.—

(1) General provisions applicable.—Except as inconsistent with the provisions of this chapter and except that in no event shall a plan of reorganization be formulated, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions (other than section 96(e) of Title 11) of chapters I to VII, inclusive, of the Bankruptcy Act as section 502 of Title 11 would make applicable if an order of the court had been entered directing that bankruptcy be proceeded with pursuant to the provisions of such chapters I to VII, inclusive; except that the court may, for such period as may be appropriate, stay enforcement of, but shall not abrogate, the rights provided in section 108 of Title 11 and the right to enforce a valid, non-preferential lien or pledge against the property of the debtor. For purposes of applying the Bankruptcy Act in carrying out this section, any reference in the Bankruptcy Act to the date of commencement of proceedings under the Bankruptcy Act shall be deemed to be a reference to the filing date (as defined in section 78eee(b) (4) (B) of this title)."

15 U.S.C. § 78eee provides in relevant part:

"(c) SEC participation in proceedings.—The Commission may, on its own motion, file notice of its appearance in any proceeding under this chapter and may thereafter participate as a party."

FEDERAL RULES INVOLVED

Rule 4 of the Federal Rules of Appellate Procedure provides in relevant part:

> "(a) Appeals in Civil Cases.
>
> "(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .
>
> ". . .
>
> "(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later."

STATEMENT OF THE CASE

This case arises out of proceedings in the United States District Court for the Central District of California brought by the Securities Exchange Commission (SEC) and the Securities Investor Protection Corporation (SIPC) to protect customers of Pacific Western Securities, Inc., an insolvent securities dealer. In the course of these proceedings petitioner Allen Mansfield filed a claim against SIPC for insurance coverage on the custodian accounts of his six children, on his own account, and on various trust accounts. The trustee asserted counterclaims against Mansfield. On recommendation of a special master, the district court entered judgment on October 31, 1979, dismissing Mansfield's claims and awarding the trustee $100,000 on his counterclaim against Mansfield.

The issues in this case relate to the events which followed entry of this judgment. These facts are related in petitioner Mansfield's affidavit in support of his ex parte motion for extension of time to file his notice of appeal. This motion was filed on December 28, 1979, by new counsel then substituted in for his trial counsel. (*See* Appendix D.) Petitioner Mansfield's affidavit recites that he did not receive, until after thirty days expired, a letter from his trial attorney indicating the date of entry of judgment and stating that the attorney's opinion that Mansfield had thirty days in which to file his notice of appeal. The letter had been sent to the wrong address. (Appendix D.) A copy of the trial attorney's letter is attached as Appendix E. It reminded petitioner Mansfield that the argeement of representation did not include an appeal and that "the entry of an adverse judgment terminates our obligation to perform any further legal services." (Appendix E.)

Petitioner Mansfield points out in his affidavit that he attempted to file a notice of appeal in propria persona

through his secretary, and this notice was not filed because it was untimely. (Appendix D.) On December 28, 1979, his new attorney filed an ex parte motion for extension of time to file the notice of appeal. (Appendix D.) This motion was denied that same day. (Appendix C.) This appeal was taken by petitioner Mansfield from the order of December 28, 1979, denying the ex parte motion for an extension of time pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure. On September 29, 1980, the Ninth Circuit issued an interim order denying petitioner's motion to permit refiling of his appeal with a finding that the United States was not a party to the action for purposes of Rule 4(a) of the Federal Rules of Appellate Procedure. (Appendix B.) On May 12, 1981, the Ninth Circuit granted appellee SIPC's motion for summary disposition and affirmed the district court's order denying appellant's motion to extend time. (Appendix A.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THIS CASE PRESENTS A NOVEL AND IMPORTANT QUESTION AS TO WHETHER A PARTY HAS SIXTY (60) DAYS IN WHICH TO FILE HIS NOTICE OF APPEAL IN A CASE WHERE THE SECURITIES EXCHANGE COMMISSION HAS BEEN THE NAMED PLAINTIFF THROUGHOUT LIQUIDATION PROCEEDINGS FILED UNDER THE SECURITIES INVESTOR PROTECTION ACT OF 1970.

In this case, the Securities Exchange Commission was the named plaintiff on the caption of every document filed in the district court. The United States Court of Appeals for the Ninth Circuit, however, rejected appellant Mans-

field's contention that he had sixty (60) days in which to file his notice of appeal because an agency of the United States was a party to the action in which the appeal was taken. (*See* Appendix B.) Rule 4(a) of the Federal Rules of Appellate Procedure clearly specified that a party has sixty (60) days in which to file his notice of appeal if "the United States or an officer or agency thereof" is a party.

In holding that an agency of the United States was not a party to the action sought to be appealed from the district court, the Ninth Circuit relied on its decision in *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, (9th Cir. 1977). In that case, the Ninth Circuit adopted the view of Professor Moore that in bankruptcy proceedings, the United States should not be deemed a "party," unless it is a participant in the particular controversy which led to the appeal. *Id.* at 204. Professor Moore's view is set forth in the following passage from his treatise:

> "As has been noted, Rule 4(a), unlike former Civil Rule 73(a), governs appeals in bankruptcy proceedings. As a result the provision fixing sixty days as the time for an appeal in an action in which the government is a party extends to bankruptcy proceedings. The United States is a creditor in a great many bankruptcy proceedings, either for taxes or for other indebtedness, and it not infrequently intervenes generally in a general bankruptcy proceeding. Should its status as a creditor or as a general intervenor make every controversy arising in the general proceeding an action in which the United States is a party? The answer should be no. Bankruptcy involves many diverse and often unrelated proceedings. It is to those that Rule 4(a) refers when it mentions "a proceeding in bankruptcy or a controversy arising therein." Each such has its

> own participants. If the United States is a participant then the proceeding is one in which it is a party; otherwise, it is not. Suppose, for example, that *A* files a reclamation petition and the United States, either as a creditor or as an intervenor, supports or opposes the petition. It is clearly a party. But if it takes no part in the controversy the mere fact that it is in the general proceeding should not make the controversy one to which it is a party. To hold otherwise is to make sixty days the general time for appeal in countless bankruptcy matters without any reason for the added time. This view does not derogate from Judge Friendly's view that the language of the provision fixing sixty days in cases to which the government is a party should be read exactly as it is written. A party to a particular bankruptcy proceeding or controversy in which the United States evidences no interest cannot reasonably suppose that the United States is a party. Such authority as there is on the subject is in agreement." 9 *Moore's Federal Practice* ¶ 204.10 at 4-37 (2d ed. 1980) (footnotes omitted).

The authority referred to in the last sentence of this excerpt from Moore's treatise is the *Combined Metals Reduction* case where the Ninth Circuit relied on Moore as authority for its view.

Petitioner Mansfield first submits that the Securities Exchange Commission was no mere creditor or intervenor in the liquidation proceedings held in the district court in this case. Under the Securities Investor Protection Act of 1970, liquidation of a broker-dealer Pacific Western Securities, Inc., is a specialized proceeding before a federal district court (rather than a bankruptcy

court). 15 U.S.C. §§ 78u(d), 78aa, and 78eee(2). Even though the proceeding is not a proceeding in bankruptcy court, certain provisions of the Bankruptcy Act apply to liquidation proceedings under SIPA. 15 U.S.C. § 78fff(c). As this Court explained in *Securities Investor Protection Cor. v. Barbour*, 421 U.S. 412 (1975), the purpose of Congress in enacting SIPA was to avoid lengthy bankruptcy proceedings which tied up the property of customers of failed or unstable dealers:

> "Following a period of great expansion in the 1960's, the securities industry experienced a business contraction that led to the failure or instability of a significant number of brokerage firms. Customers of failed firms found their cash and securities on deposit either dissipated or tied up in lengthy bankruptcy proceedings. In addition to its disasterous effects on customer assets and investor confidence, this situation also threatened as 'domino effect' involving otherwise solvent brokers that had substantial open transactions with firms that failed. . . .
>
> ". . .
>
> ". . . Most important for present purposes, the Act creates a new form of liquidation proceeding, applicable only to member firms, designed to accomplish the completion of open transactions and the speedy return of most customer property." 421 U.S. at 415-416.

Insofar as the Moore view adopted by the Ninth Circuit in *Combined Metal Reduction* carves out a special exception for appeals in bankruptcy cases, this exception simply does not apply in the instant case. Proceedings under SIPA are *sui generis*. While they have some aspects of bankruptcy proceedings, they are not bankruptcy

proceedings. Jurisdiction to proceed under SIPA is not conferred by 28 U.S.C. § 1334, but rather jurisdiction is conferred under 28 U.S.C. § 1331 (the general federal question statute) in conjunction with 15 U.S.C. §§ 78u(e), 78aa and 78eee(2).

With respect to non-bankruptcy cases, Professor Moore is of the view that whenever the United States, an officer or agency was involved in district court proceedings, sixty days to file the notice of appeal should mean sixty days and nothing less. His treatise states:

> "The sixty-day period is available to all parties whenever the United States or an officer or agency thereof was a party to the action in the district court. It is immaterial that the government is not a party to or is not interested in the appeal that is actually taken. There is, however, some support for the view that the thirty- rather than the sixty-day period applies if the government was merely a formal or nominal party to the action in the district court or had not interest in the appellant's claim there. But such a view introduces an element of uncertainty in the very critical, because regarded as jurisdictional, area of the time for appeal, and it ought not find favor." 9 *Moore's Federal Practice*, ¶ 204.10 at 4-34 - 4-36 (2d ed. 1980).

In *United States v. American Society of Composers, Authors, & Publishers*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964), the Second Circuit per Judge Friendly rejected a test which would have made the applicable period depend on the government's interest in the appeal. Professor Moore has found Judge Friendly's reasoning "equally conclusive against any except a quite literal reading of 'any action in which the United States

. . . is a party.' " 9 *Moore's Federal Practice supra,* ¶ 204.10 at 4-36. In the *ASCAP* case, Judge Friendly wrote:

> "It is in the last degree undesirable to read into a procedural statute or rule, fixing the time within which action may be taken, a hidden exception or qualification that will result in the rights of clients being sacrificed when capable counsel have reasonably relied on the language. Section 2107 of Title 28 and F.R. Civ. Proc. 73(a) unequivocally allow 'to all parties' 60 days to appeal in any action 'in which the United States or an officer or agency thereof is a party.' The stated criterion is whether the United States is a party to the action, a test clearly satisfied here, and not whether the United States is concerned with the particular order sought to be appealed—something that often cannot be accurately determined when the order is made." 331 F.2d at 119.

Although the *ASCAP* case was decided under former Rule 73(a) of the Federal Rule of Civil Procedure, Professor Moore concludes that "The language of Rule 4(a) is as unequivocal as that of former Civil Rule 73(a), and it should be construed in the same fashion." 9 *Moore's Federal Practice, supra,* ¶ 204.10 at 4-37. Significantly, the Ninth Circuit held in 1978 that when the United States is a named party, participates in the general action and is, or may be, interested in the outcome of an appeal, even though it is not a party to the appeal, then it is a party for purposes of Rule 4(a) of the Federal Rules of Appellate Procedure. *In re Paris Air Crash,* 578 F.2d 264, 265 (9th Cir. 1978). In its opinion, the Ninth Circuit stated: "We agree with Judge Friendly and Professor Moore that a literal reading of the 60-day exception is the preferred

view in order to eliminate the element of uncertainty created by a "hidden exception or qualification' in a critical procedural rule." (*Id.*)

Petitioner Mansfield submits that where an agency of the United States (here the SEC) is a party to the general action in a United States district court, it is critical that there be a fixed rule upon which every litigant may rely as to when he or she has sixty days rather than thirty in which to file a notice of appeal. Jurisdiction on appeal should not turn on any *ex post facto* analysis of whether the United States participated enough to make it a party for purposes of the sixty day exception in Rule 49(a). A misstep by the appellant or his counsel in reliance on the sixty-day rule will be fatal if the court makes an *ex post facto* decision which disagrees with the litigant that a notice of appeal was timely after the first thirty days from entry of judgment has run. Because jurisdiction on appeal under the sixty-day exception Rule 4(a) has such catastrophic consequences, petitioner Mansfield submits that this case presents a question of sufficient importance to warrant a grant of certiorari. Only this Court can deliver the authoritative interpretation of the sixty-day exception which will bind all of the circuits and settle this important question definitively.

It should be observed that there is no sound reason why a simple mechanical rule could not be applied to all federal actions whether denominated civil or bankruptcy. If the United States, an officer or agency thereof is named in the caption of the case or if the United States, an officer or agency has entered an appearance under the same case number in the district court, the appellant should be able to rely with confidence on his or her having sixty days in which to file the notice of appeal. Any other rule requires the federal courts to make hairsplitting decisions after the fact as to whether the United States was involved enough

in a particular aspect of the litigation to be called a party. This Court should view this question not from the perspective of a seasoned federal practitioner but from the standpoint of an *in propria persona* layman who confronts the language of Rule 4(a) for the first time just before he has to make the critical decision as to when he must file the notice of appeal. Petitioner does not believe that it can honestly be said that an unrepresented appellant can know that the sixty-day exception does not apply when the United States, an officer or agency has appeared or is named right in the caption of all the papers in the file. After all, *In re Paris Air Crash, supra,* held that the United States was a party for purposes of Rule 4(a) when it was not directly involved in the particular procedural facet of the case which led to the appeal but had been named as a defendant in the complaint. 578 F.2d at 265.

Although this case is not a bankruptcy case, there is no good reason for having one rule for bankruptcy and another for civil cases. Professor Moore finds something wrong with having ". . . sixty days the general time for appeal in countless bankruptcy matters without any reason for the added time." 9 *Moore's Federal Practice, supra,* ¶ 204.10 at 4-37. Petitioner submits that the reason for allowing extra time for appeal even in cases where the United States is marginally involved is to assure certainty. The appellant could safely point to any involvement by the United States as support for his decision to file the notice of appeal after the first thirty days has run. There are simply no countervailing considerations of policy which outweigh the obvious benefits of a sure and certain mechanical rule. Allowance of sixty days even in the marginal cases will not have any demonstrable effect on the appellate caseload. Indeed, the mechanical rule which petitioner urges should eliminate any appeals on the question of whether the United States was or was not a party in the district court.

Before closing, petitioner submits that the fact that he presently has no notice of appeal on file should not preclude this Court from granting him relief under the interpretation of Rule 4(a) which he urges this Court to make. He did submit *in propria persona* a notice of appeal before the sixty-day period expired, and it was returned unfiled because he had not accompanied it with the filing fee. Moreover, a liberal construction of his motion for extension of time filed before the expiration of the sixty-day period also manifested his intention to appeal and should be treated as a notice of appeal. Petitioner therefore urges that this Court's order be so framed as to permit him at least a day to put a formal notice of appeal on record and pay the filing fee which he would have done if the district court clerk would have accepted them without an extension having been granted.

In closing, petitioner further points out that the important questions which this petition presents may well be susceptible to *per curiam* treatment in summary fashion without briefing and argument. So that the Court may get the benefit of the Solicitor General's views, petitioner has served him with the requisite copies of this petition.

II.

THIS CASE PRESENTS A SECOND IMPORTANT QUESTION AS TO WHAT CONSTITUTES "EXCUSABLE NEGLECT" UNDER APPELLATE RULE 4(a).

Petitioner Mansfield submits that, if certiorari were granted and this Court held that he had sixty (60) days in which to file his notice of appeal, an order of this Court permitting him to proceed with the appeal would dispose of the case. But even if petitioner had only thirty days in which to file his notice of appeal, he submits that the trial court abused its discretion in denying his motion for an

extension of time to file the notice of appeal. (*See* Appendix C.)

In this case, petitioner Mansfield's trial counsel received timely notice of the judgment entered on October 31, 1979. Pursuant to his engagement agreement with petitioner Mansfield, trial counsel considered his representation of petitioner Mansfield to terminate with the entry of that judgment. (Appendix E.) Petitioner Mansfield was thus left without an attorney at this critical stage of his case. At this point, the attorney's letter to petitioner Mansfield was sent to the wrong address, and petitioner Mansfield did not receive it until more than thirty days had elapsed since entry of judgment. (Appendix D.)

Petitioner submits that, on these facts, there is an important question appropriate for decision by this Court as to whether petitioner Mansfield's failure to receive the notice provided in the letter from his attorney constituted a sufficient showing of "excusable neglect" under Rule 4(a)(5) of the Federal Rules of Appellate Procedure so that the denial of his motion for extension of time constituted an abuse of discretion. Several cases have held that notice to the trial attorney of entry of judgment constitutes notice to the appellant so that the appellant cannot assert a lack of knowledge which would otherwise be "excusable neglect." *In re Butler's Tire & Battery Co.*, 592 F.2d 1028, 1033 (9th Cir. 1979); *Harlan v. Graybar Electric Co.*, 442 F.2d 425, 426 (9th Cir. 1971). It is unfair, however, to impute notice to a party from notice to his counsel under circumstances where the attorney will take no steps to act on that party's behalf. Engagement agreements for the trial of cases commonly, if not almost universally, contain a provision that the trial attorney's engagement does not include any appeal. *See, e.g.*, sample retainer agreements in A. Werchick, *California Preparation and Trial*, § 110 at 16-17 (3d ed. 1981). The

prevalence of retainer agreements of this type makes this question one of sufficient importance to justify a grant of certiorari in this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LAW OFFICES OF RUSSELL IUNGERICH

By Russell Iungerich

Attorneys for Petitioner

APPENDIX A

ORDER OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SUMMARILY AFFIRMING DISTRICT COURT ORDER DENYING AN EXTENSION OF TIME FOR FILING NOTICE OF APPEAL.

United States Court of Appeals For the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

SECURITIES INVESTOR PROTECTION CORPORATION,

Applicant/Appellee,

v.

PACIFIC WESTERN SECURITIES, INC.,

Defendant,

ALLEN MANSFIELD,

Claimant/Appellant.

FILED

MAY 12 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

No. 80-5081
D.C. #CV73-646 LTL
CENTRAL CALIFORNIA

ORDER

Before: KENNEDY and FARRIS, Circuit Judges.

Upon due consideration, the court issues the following order:

(a) appellant's motion to file a supplemental brief is denied;

(b) the court grants appellee's motion for summary disposition. The district court's order denying appellant's motion to extend the time for filing notice of appeal is affirmed; and

(c) appellee is awarded costs on appeal. Appellee's request for attorney's fees is denied.

Mo Cal 5/4/81

APPENDIX B

INTERIM ORDER OF THE NINTH CIRCUIT IN WHICH THE COURT FOUND THAT THE UNITED STATES WAS NOT A PARTY TO THE ACTION FOR PURPOSES OF RULE 4(a) OF FEDERAL RULES OF APPELLATE PROCEDURE.

United States Court of Appeals For the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

SECURITIES INVESTOR PROTECTION CORPORATION,

Applicant/Appellee,

v.

PACIFIC WESTERN SECURITIES, INC.,

Defendant,

ALLEN MANSFIELD,

Claimant/Appellant.

FILED

SEP 29 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

No. 80-5081

D.C. #CV 73-646 LTL CENTRAL CALIFORNIA

Before: WALLACE and SCHROEDER, Circuit Judges.

Upon due consideration, the court issues the following order:

(a) appellee's notice for an extension of time in which to file opposition to appellant's motion is granted and the opposition, heretofore received, is ordered filed;

(b) appellant's motion to permit refiling of appeal is denied. The court finds that the United States is not a party to the action for purposes of Fed. R. App. P. 4(a). *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977); and

(c) appellant is granted an extension of time of fourteen (14) days from the entry of this order in which to file his reply brief.

Mo Cal 9/22/80

APPENDIX C

DISTRICT COURT ORDER DENYING APPLICATION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL.

Denied

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Attorney for Claimant, ALLEN MANSFIELD, in his individual & representative capacity.

CLERK, U.S. DISTRICT COURT

DEPUTY

United States District Court
Central District of California

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

SECURITIES INVESTOR PROTECTION CORPORATION,

Applicant,

v.

PACIFIC WESTERN SECURITIES, INC.,

Defendant.

ALLEN MANSFIELD,

Claimant.

NO. 73-646-LTL

EX PARTE ORDER EXTENDING TIME FOR FILING APPEAL AND FOR FILING RECORD AND DOCKETING APPEAL

On motion of the claimant and on application of the claimant ex parte, the court being fully advised, it is ordered that the time for filing the appeal and the record on

appeal with the United States Court of Appeals for the Ninth Circuit, and for the docketing therein the appeal taken by claimant, MANSFIELD extended to December 30, 1979, pursuant to Rule 4(a) of the Federal Rules of Civil Procedure.

DATED: December 28, 1979

Denied.
Marianna R. Pfaelzer
UNITED STATES DISTRICT JUDGE

FOR LAWRENCE T. LYDICK
UNITED STATES DISTRICT JUDGE

Presented by
TRACY O. GUERIN, ESQ.
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APPENDIX D

PETITIONER'S MOTION PAPERS IN DISTRICT COURT.

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Attorney for Claimant, ALLEN MANSFIELD, in his individual & representative capacity.

F I L E D

DEC 28 1979

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

United States District Court
Central District of California

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

SECURITIES INVESTOR PROTECTION CORPORATION,

Applicant,

v.

PACIFIC WESTERN SECURITIES, INC.,

Defendant.

ALLEN MANSFIELD, Claimant.

NO. 73-646-LTL

EX PARTE APPLICATION TO EXTEND TIME FOR APPEAL AND FOR EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL & ORDER THEREON

December 28, 1979.

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

Claimant hereby moves the court for an order extending the time to appeal from the judgment entered October 31,

1979 for a period of thirty (30) days to and including the 31st day of December, 1979.

The defendant-appellant did not learn of the entry of judgment until December, 1979, after time for appeal had run.

The clerk's notice of entry of judgment was mailed to HAROLD TOMIN counsel for defendant on the 31st day of October 1979 who on November 5, 1979 mailed the Notice of Judgment, certified, return receipt requested, to Claimant ALLEN MANSFIELD at his residence in Hawaii. Because of MR. MANSFIELD's presence in California at that time, the Notice of Judgment was never timely received by him.

The opposing attorneys in this case are:

MARTIN WASHTON, ESQ. (213) 488-7418

WILFRED CARON, ESQ. (202) 223-8400

Attached hereto are the affidavits of HAROLD TOMLIN, ALLEN MANSFIELD and TRACY O. GUERIN in support of this motion.

DATED: December 27, 1979

/s/

TRACY O. GUERIN

TRACY O. GUERIN, ESQ.
4676 Admiralty Way
Suite 336
Marina del Rey, California 90291
(213) 821-7967

Attorneys for Claimant
ALLEN MANSFIELD, in his individual
& representative capacity.

United States District Court
Central District of California

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

SECURITIES INVESTOR PROTECTION CORPORATION,

Applicant,

v.

PACIFIC WESTERN SECURITIES, INC.,

Defendant.

ALLEN MANSFIELD, Claimant.

NO. 73-646-LTL

AFFIDAVIT OF TRACY O. GUERIN

I. TRACY O. GUERIN, being first duly sworn, depose and say:

1. I am an attorney at law duly licensed to practice in the State of California and in the Ninth Circuit of the United States District Court.

2. I have been substituted in as attorney of record for ALLEN MANSFIELD for the purpose of filing a Motion to Extend Time for Appeal, which was agreed to by MR. MANSFIELD during a telephone conversation on Decem-

ber 20, 1979. A copy of the Substitution of Attorneys is attached hereto.

3. On December 20, 1979, I called attorney MARTIN WASHTON of the firm GIBSON, DUNN & CRUTCHER and was informed he was in trial. I left a message with his secretary of my intention to file a Motion to Extend Time for Appeal. I did not receive a return call from him. On December 27, 1979, I again called his office and was again informed he was in trial and I again left the same message, telling him I would appear on December 28, 1979 at 10:00 a.m., on an Ex Parte Motion for an Order to Extend time to file an appeal and to file the appeal. His secretary called me back and said he would call me but as of 5:00 p.m., this date, I have not heard from him.

4. On December 27, 1979, I reached WILFRED CARON, whose office is in Washington, D.C. I personally informed him of my intention to file a Motion for Extension of Time for Appeal on December 28, 1979 and to request an Ex Parte Order since the time was running short, and explained to him the circumstances of Mr. Mansfield's non receipt of the Notice of Entry of Judgment. He informed me his position would be to oppose such a motion.

5. Mr. Mansfield attempted to file his Notice of Appeal on December 13, 1979, but it was returned to his address in Hawaii by mail on that date as not being timely filed, or the record correctly designated. Mr. Mansfield called my office late in the day on December 20, 1979, after he had received the return of his notice of appeal. I then attempted to call the opposing counsel. I have not had the benefit of the file in this case, but have had to rely upon the information provided me by the other attorneys in this matter.

Executed this 28th day of December, 1979, at Marina del Rey, California.

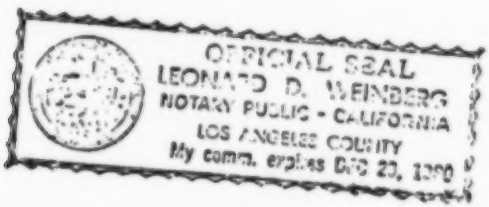
/s/

TRACY O. GUERIN

Subscribed and sworn to before me this 28th day of December, 1979.

/s/

Notary Public in and for said County and State.



TRACY O. GUERIN, ESQ.
4676 Admiralty Way
Suite 336
Marina del Rey, CA. 90291
(213) 821-7967

Attorney for Appellant, ALLEN MANSFIELD

United States District Court
Central District of California

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

SECURITIES INVESTOR PROTECTION CORPORATION,

Applicant,

v.

PACIFIC WESTERN SECURITIES, INC.,

Defendant.

RE: CLAIMS OF ALLEN MANSFIELD AS CUSTODIAN FOR SIX MINOR CHILDREN, *et al.*,

Claimants.

NO. CV-73-646-LTL

SUBSTITUTION OF ATTORNEY

I hereby substitute TRACY O. GUERIN as my attorney in the above captioned case.

/s/

Dated: December 18, 1979 Allen Mansfield

/s/

Dated: December 27, 1979 Tracy O. Guerin

AFFIDAVIT OF ALLEN MANSFIELD

I, Allen Mansfield, am the claimant for myself, for my children, for Pacwespp Pension Plan and for Carmona Consultants, Inc. in the trusteeship under SIPC and acted as attorney in pro se upon the withdrawal from the case of Mr. Harold Tomin.

I received the court files for the first time from Mr. Tomin in December, after the 30 day period for appeal was passed. I, further, did not receive communication from Mr. Tomin until the appeal date was passed since he forwarded to me a registered letter dated in November, which was sent to a former address and then forwarded to my home out of state. This communication was to inform me that an appeal needed to be filed within 30 days but did not serve its purpose. I contacted Mr. Tomin by phone in December, which was already passed the deadline and at that time it was determined that he was not handling the appeal, but he did not tell me of the necessity of making a motion for extension of time to file the appeal.

On December 13th, after I left California to return to my home, my secretary attempted to file a Notice of Appeal and Designation of Record, but these materials were returned to her and not accepted. They were returned on the basis that they were not timely filed.

I state the foregoing to be true under oath.

December 18, 1979 /s/

Allen Mansfield

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS 18th DAY OF DECEMBER, 1979.

/s/

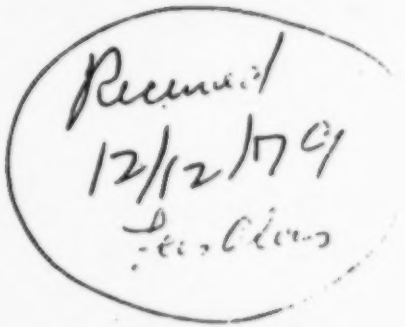
ANN K. FUKESALN
Notary Public,
State of Hawaii

My Commission Expires: 4-15-82

APPENDIX E

LETTER FROM COUNSEL WHICH PETITIONER DID NOT RECEIVE UNTIL AFTER THIRTY DAYS HAD ALREADY ELAPSED FROM ENTRY OF JUDGMENT.

HAROLD J. TOMIN
A Law Corporation
1901 Avenue of the Stars
Suite 800
Los Angeles, California 90067
Telephone (213) 277-8822



CERTIFIED MAIL
RETURN RECEIPT REQUESTED

November 5, 1979

Mr. Allen Mansfield
616 Kumukahi Place
Honolulu, Hawaii 96825

Re: Securities and Exchange Commission vs. Pacific Western Securities, Inc.; Mansfield Claims — U.S. District Court Central District of California CV-73-646-LTL *AND* Mansfield vs. Wells Fargo Bank — LASC Number C 76985

Dear Mr. Mansfield:

On October 31, 1979, the Court entered judgment against you in the above-captioned matter involving your claims under the Securities Investor Protection Act. A copy of Notice of Entry of Judgment, the Judgment and Order of the Court Adopting the Master's Recommendations are enclosed herewith.

You will recall that our agreement of representation in this matter is limited to legal services in the trial court and

specifically disclaims an obligation to represent claimants on Appeal. Thus, the entry of an adverse judgment against claimants terminates our obligation to perform any further legal services.

You should be aware that the rules of appeal for the United States Circuit Courts of Appeal, Appellant Rule 4(a) provide a thirty day period from the entry of judgment in which a Notice of Appeal may be timely filed. Failure to timely file the Notice of Appeal will result in the termination of your right to seek appeal as a matter of right. I repeat, we are doing nothing to perfect an Appeal, so it is incumbent on you to act accordingly.

On November 30, 1979, the Los Angeles Superior Court will enter an order pursuant to Code of Civil Procedure Section 583(b) in *Mansfield vs. Wells Fargo Bank* dismissing the action. Since our retainer agreement provides for the rendering of services only in connection with the trial court proceedings, the entry of this order of dismissal will terminate our obligation to provide services. Enclosed herewith is a copy of the court's order which will be entered on November 30, 1979.

An Appeal of the Order of Dismissal must be filed within sixty (60) days of the order of entry of judgment. We caution you to observe this time limitation should you desire to Appeal. We repeat, that we will be taking no action to perfect or prosecute an Appeal in the Superior Court matter.

This letter is written on behalf of Harold J. Tomin, A Law Corporation and Diller and Freedman, A Professional Corporation and the respective members and employees of each.

Very truly yours,

HAROLD J. TOMIN
A Law Corporation

By: /s/
Harold J. Tomin, Esq.

HJT:dd
enclosures

cc: David Pantalena, Esq.
Diller & Freedman

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on August 8, 1981, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
1 First St., N.W.
Washington, D.C. 20543
(202) 252-3011
(Original & 39 copies hand delivered)

John L. Endicott and
Gibson, Dunn & Crutcher, Counsel to Edwin M. Lamb, Trustee (Appellee)
515 South Flower Street
Los Angeles, California 90071

Solicitor General
Department of Justice
Washington, D.C. 20530

Theodore H. Focht
General Counsel
Securities Investor Protection Corporation (Appellee)
900 Seventeenth Street, N.W.
Suite 800
Washington, D.C. 20006

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 8, 1981 at Santa Monica, California.

Kirk W. Harney
(Original signed)

Opposition

Office - Supreme Court
FILED
SEP 11 1981
ALEXANDER L. STEVAS
CLERK

No. 81-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALLEN MANSFIELD,
Petitioner,
v.
SECURITIES INVESTOR PROTECTION CORPORATION and EDWIN M. LAMB, Trustee for the Liquidation of Pacific Western Securities, Inc.
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF OF RESPONDENTS SECURITIES INVESTOR PROTECTION CORPORATION AND EDWIN M. LAMB, TRUSTEE, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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DANIEL M. KOLKEY

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a liquidation proceeding under the Securities Investor Protection Act, the court of appeals correctly held that the Securities and Exchange Commission ("SEC"), and hence the United States, was not a party to the proceeding for purposes of Fed. R. App. Pro. 4(a)(1) where:

(a) The SEC had previously received all the relief it had requested in the action;

(b) The SEC took no role whatever in the proceedings between petitioner Mansfield and the respondents;

(c) The SEC filed no notice of appearance in the proceeding between petitioner Mansfield and the respondents under § 5(c) of the Securities Investor Protection Act, 15 U.S.C. § 78eee(c);

(d) Neither Mansfield nor his attorneys relied upon the presence of the SEC as a party in determining the length of time within which to file a notice of appeal.

2. Whether the court of appeals correctly held that petitioner Mansfield's conduct in failing to file a notice of appeal within thirty days of entry of judgment did not constitute "excusable neglect" for purposes of Fed. R. App. Pro. 4(a)(5).

LIST OF PARTIES

The only parties to this dispute are:

Allen Mansfield, Petitioner.

Securities Investor Protection Corporation, Respondent.

Edwin M. Lamb, Trustee for the Liquidation of Pacific Western Securities, Inc., Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-270

ALLEN MANSFIELD,
Petitioner,
v.
SECURITIES INVESTOR PROTECTION CORPORATION and EDWIN M. LAMB, Trustee for the Liquidation of Pacific Western Securities, Inc.
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF OF RESPONDENTS SECURITIES INVESTOR PROTECTION CORPORATION AND EDWIN M. LAMB, TRUSTEE, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The underlying merits of the dispute between the parties are not before the court. The issues discussed herein are solely procedural.

The Initiation of the Liquidation Proceeding

On March 28, 1973, upon the application of Respondent Securities Investor Protection Corporation ("SIPC"), the United States District Court for the Central District of California appointed Respondent Edwin M. Lamb as trustee to liquidate Pacific Western Securi-

ties, Inc. ("Debtor") under the Securities Investor Protection Act of 1970 ("SIPA"), 15 U.S.C. § 78aaa *et seq.* (1970).[1] In that same action,[2] the SEC sought certain injunctive relief unrelated to the actual liquidation of the Debtor. The injunctive relief requested by the SEC was granted by order of the district court dated May 8, 1973, and since that date the SEC has played no role in any aspect of the liquidation proceeding.

The Dispute Between Mansfield and the Respondents

Allen Mansfield ("Mansfield") submitted certain claims against the estate of the Debtor, and the trustee asserted counterclaims against Mansfield.

On October 31, 1979, the district court, upon the recommendation of the Bankruptcy Judge to whom the matter was referred and before whom the case was tried, entered a judgment dismissing Mansfield's claims and awarding $100,000 to the trustee on his counterclaims. The SEC took no position on the claim of Mansfield or any other claimant in the Debtor's liquidation. The SEC did not file a notice of appearance under SIPA § 5(c), 15 U.S.C. § 78eee(c), with respect to the dispute between Mansfield, the trustee and SIPC. The SEC did answer interrogatories propounded by Mansfield, but did not participate in any way in the trial of the claims or counterclaims.

---

[1] SIPA has subsequently been amended by Pub. L. No. 95-283, 92 Stat. 249 (1978), Pub. L. No. 95-598, 92 Stat. 2549 (1978), and Pub. L. No. 96-433, 94 Stat. 1855 (1980). The amendments are not applicable to this case, and in any event would not affect the issues herein.

[2] Docket No. 73-646. As has been the usual practice in SIPA proceedings, SIPC'S application for the appointment of a trustee was "combined" with the SEC's complaint for injunctive relief. This is authorized by § 5(a)(3)(A) of SIPA, 15 U.S.C. § 78fff(a)(3)(A).

Mansfield's Post Judgment Motion

Mansfield did not file a notice of appeal within thirty days. On December 28, 1979, nearly two months after entry of judgment, Mansfield made an "Ex Parte Application To Extend Time For Appeal and For Extending Time For Filing Record and Docketing Appeal and Order Thereon." Mansfield did not assert that the SEC was a party to the dispute on his motion, nor did he assert that he had sixty days within which to appeal (rather than thirty days under Fed. R. App. Pro. 4(a)(1)). The hearing, before District Court Judge Mariana R. Pfaelzer was held *ex parte,* in violation of Fed. R. App. Pro. 4(a)(5), and no proper notice under that rule was given SIPC or the trustee. Consequently, neither the trustee nor SIPC was able to cross-examine or inquire into Mansfield's allegations of fact upon which he based his motion for "excusable neglect."

Mansfield's Ex Parte Application was denied on that same day by order of Judge Pfaelzer. Mansfield then appealed Judge Pfaelzer's order to the United States Court of Appeals for the Ninth Circuit.

At no time has Mansfield ever filed a valid notice of appeal.

Relevant Proceedings in the Court of Appeals

On appeal, Mansfield raised but one issue: Whether his conduct in failing to file a notice of appeal within the thirty day period from entry of judgment against him on October 31, 1979 constituted excusable neglect. SIPC and the trustee filed a joint brief in response to that issue. It should be noted that since Mansfield did not utilize Fed. R. App. Pro. 10(c), there is no record of what transpired at the December 28, 1979 hearing.

Mansfield then made a series of motions to the court of appeals alleging, for the first time, that the United States was a party to the action and consequently he had sixty, rather than thirty days from October 31, 1979, in which to appeal. Mansfield alleged, among other things,[3] that the SEC was a party to the proceeding. By order dated September 29, 1980, the court of appeals held that the United States was not a party to this proceeding for purposes of Fed. R. App. Pro. 4(a). By order dated January 14, 1981, the court of appeals refused to reconsider its September 29, 1980 order.

Thereafter, SIPC and the trustee moved for summary disposition of the appeal, which motion was granted by the court of appeals by order dated May 12, 1981. In that order the court of appeals affirmed the district court's order which denied Mansfield's motion to extend the time for filing a notice of appeal.

SUMMARY OF ARGUMENT

This court should not grant the petition for writ of certiorari in this case for the following reasons.

1. The United States was not a party to the dispute between Mansfield, on the one hand, and SIPC and the trustee, on the other. The United States had received all of the relief that it had requested in the case some six years prior to the entry of judgment against Mansfield.

---

[3] At various points in this series of motions, Mansfield alleged that the trustee was an agent of the United States. Mansfield also argued that SIPC was an agency of the United States, despite the clear terms of SIPA § 3(a)(1); 15 U.S.C. § 78ccc(a)(1). Mansfield has abandoned these assertions in this court. Details of other motions made to the court of appeals do not bear on the outcome of the case.

The United States had no role in any part of the liquidation of the Debtor firm, nor did the United States file a notice of appearance under SIPA § 5(c), 15 U.S.C. § 78eee(c) in this dispute. Therefore, Mansfield did not file a timely notice of appeal within the thirty days following judgment, as required by Fed. R. App. Pro. 4(a)(1).

2. Neither Mansfield nor any of his attorneys ever relied upon the alleged presence of the United States as a party with respect to filing a notice of appeal. On the contrary, one of Mansfield's attorneys wrote him and stated "you should be aware that the rules of appeal for the United States Circuit Courts of Appeal, Appellate Rule 4(a) provide a thirty-day period from the entry of judgment in which a Notice of Appeal may be timely filed." (See Mansfield's Petition, Appendix E, p. 31). Also, one of Mansfield's subsequent attorneys filed a motion based upon allegations that Mansfield's failure to file a notice of appeal *within thirty days* constituted excusable neglect.

3. Mansfield did not file a valid notice of appeal at any time.

4. Mansfield failed to comply with Fed. R. App. Pro. 4(a)(5) in that he made his motion to extend his time for appeal *ex parte*. Thus, neither the trustee nor SIPC was given an opportunity to challenge Mansfield's allegations as to "excusable neglect." Further, Mansfield's failure to comply with Fed. R. App. Pro. 10(c) makes it impossible to determine what in fact occurred at the *ex parte* hearing on this subject. These two procedural failures make it impossible for this court to rule on the issue of "excusable neglect."

5. The facts alleged by Mansfield, even if assumed to be true, do not constitute "excusable neglect" for his failure to file a timely notice of appeal.

ARGUMENT

I

THE QUESTION OF WHETHER THE UNITED STATES IS A PARTY TO THIS PROCEEDING FOR THE PURPOSES OF FED. R. APP. PRO. 4(a)(1) IS NOT WORTHY OF REVIEW BY THIS COURT

The Nature of a Proceeding Under SIPA

The nature of a proceeding under SIPA was discussed in general terms by this court in *SIPC* v. *Barbour,* 421 U.S. 412 (1975). However, in *Barbour* the court was not concerned with an actual liquidation proceeding of a bankrupt stockbroker, but rather with a question of whether a private right of action existed to compel SIPC to initiate such a proceeding. Consequently, it is useful to discuss briefly the nature of a SIPA case.

The liquidation of a brokerage firm under SIPA is a bankruptcy proceeding for all practical purposes. See, *e.g., Exchange National Bank* v. *Wyatt,* 517 F.2d 453 (2d Cir. 1975); *SIPC* v. *Charisma Securities Corp.,* 506 F.2d 1191, 1193 (2d Cir. 1974); *SEC* v. *Aberdeen Securities Corp.,* 480 F.2d 1121, 1128 (3d Cir.), *cert. denied,* 414 U.S. 1111 (1973); *SEC* v. *Wick,* 360 F.Supp. 312 (N.D.Ill. 1973). SIPA § 6(c)(1), 15 U.S.C. § 78fff(c)(1) requires that a liquidation proceeding under SIPA be conducted in accordance with provisions of chapters I-VII and X of the Bankruptcy Act[4] which are not inconsistent with the provisions of SIPA, except that reorganization is prohibited. *SIPC* v. *Charisma Securities Corp., supra.* The trustee is given the same powers as a trustee in bankrupt-

[4] As noted above, fn. 1, this particular case is governed by SIPA prior to its amendment in 1978. Similarly, the Bankruptcy Act, 11 U.S.C. §§1 *et seq.* controls this case, rather than the recently enacted Bankruptcy Code (Bankruptcy Reform Act, Pub. L. No. 95-598 (1978)).

cy and a trustee under chapter X, and the court is given the powers and jurisdiction of a court of bankruptcy and of a court in a chapter X proceeding. SIPA §§ 5(b)(2); 6(b)(1), 15 U.S.C. §§ 78eee(b)(2); 78fff(b)(1). The proceeding looks not only to the disposition of the claims of customers, but the claims of general creditors as well.

Many of the definitions and other operative provisions of SIPA are derived, in some instances nearly *in haec verba,* from section 60e of the Bankruptcy Act, 11 U.S.C. § 96e.[5] While SIPC does not pay claims as would an insurer, SIPA is an ". . . engraftment of insurance provisions upon the preexisting section 60(e) bankruptcy provisions applicable to stockbrokers, 11 U.S.C. § 96(e)." *SEC* v. *Aberdeen Securities Co., supra,* at 1123. Like section 60e, SIPA establishes a "single and separate fund" in which all customers in the "single and separate class of creditors" share pro rata and to the exclusion of general creditors. SIPA § 6(c)(2)(B), 15 U.S.C. § 78fff(c)(2)(B). To the extent customers' claims cannot be satisfied from the single and separate fund, they they share pro rata with general creditors in the general estate. *Id.* Thus, those who fit the definition of "customer" under section 60e or SIPA are accorded preferential treatment in the form of a priority over general creditors. See *Report of Special Study of Securities Markets of the Securities and Exchange Commission,* H.R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. 411-412 (1963); *SEC* v. *Kenneth Bove & Co., Inc.,* 378 F.Supp. 697,700 (S.D.N.Y. 1974).

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[5] See S. Rep. No. 91-1218, 91st Cong., 2d Sess. 11 (1970); H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 10 (1970); *SEC* v. *F. O. Baroff Co., Inc.,* 497 F.2d 280 (2d Cir. 1974); *SEC* v. *Aberdeen Securities Co., Inc.,* 480 F.2d 1121 (3d Cir.), *cert. denied,* 414 U.S. 1111 (1973); *SEC* v. *Albert & Maquire Securities Co., Inc.,* 378 F.Supp. 906, 911 (E.D.Pa. 1974).

The subject matter of section 60e is covered in SIPA § 6(c)(2), 15 U.S.C. § 78fff(c)(2). Therefore section 60e is specifically made inapplicable. SIPA § 6(c)(1), 15 U.S.C. § 78fff(c)(1). While there are some variations between SIPA and section 60e, it is clear that a SIPA proceeding is in fact a bankruptcy liquidation, petitioner Mansfield's arguments to the contrary notwithstanding (Petition, p. 8-9).

The Court of Appeals Correctly Construed The Law

As demonstrated above, a SIPA proceeding is a bankruptcy proceeding, both in form and function. In light of this fact, the court of appeals correctly followed *In re Combined Metals Reduction Company,* 557 F.2d 179 (9th Cir. 1977). That case held that in a bankruptcy proceeding, unless the SEC "is a participant in the particular controversy which led to the appeal," the United States should not be deemed a "party" for purposes of Fed. R. App. Pro. 4(a)(1). 557 F2d 179, 203-204. In this dispute among Mansfield, the trustee, and SIPC, the SEC did not participate or file a notice of appearance, as it could have pursuant to SIPA.

To the extent that the SEC has, in the past, been involved in this proceeding as a whole, as distinguished from the adversary proceeding involving the claims of Mansfield and the counterclaims against him, the interest of the SEC had been fully and finally determined more than six years prior to the entry of the judgment Mansfield seeks to appeal. The sole interest of the SEC involved the entry of injunctive relief against the Debtor and was unrelated to any aspect of the liquidation proceeding. That injunctive relief was granted by order of the district court dated May 8, 1973. The SEC took no position on the claim of Mansfield or any other claimant

in the Debtor's liquidation, nor did it participate in the liquidation proceeding as a whole.

SIPA gives the SEC the absolute right to file a notice of appearance in any proceeding under that statute, and to proceed as a party thereafter. SIPA § 5(c), 15 U.S.C. § 78eee(c). The SEC has not done so; it has simply declined to involve itself as a party to this dispute. If the United States had supported or approved Mansfield's claim in this case, it would have clearly been a "party" for the purposes of Rule 4(a)(1). As was stated in 9 *Moore's Federal Practice*, ¶ 204.10, at 4-37 (2d ed. 1980), with respect to the United States:

> But if it takes no part in the controversy the mere fact that it is in the general proceeding should not make the controversy one to which it is a party. To hold otherwise is to make sixty days the general time for appeal in countless bankruptcy matters without any reason for the added time. . . . A party to a particular bankruptcy proceeding or controversy in which the United States evidences no interest cannot reasonably suppose that the United States is a party.

Professor Moore notes that applying this rule in bankruptcy is not in derrogation of the general rule that Rule 4(a) should be construed to give any potential appellant sixty days to appeal when the government is a party to a nonbankruptcy case. *Id.*

Neither Mansfield Nor His Attorneys Relied Upon The Presence of The SEC As A Party In Determining When To File A Notice of Appeal

Mansfield's failure to file a notice of appeal within thirty days had nothing whatever to do with any belief by him or his counsel that the SEC was a party to the dispute between himself and the trustee and SIPC. Indeed, even though Mansfield's procedural failings make the record

in this case incomplete,[6] it is clear that Mansfield, *and* his attorneys, at all relevant times believed that pursuant to Rule 4(a)(1), Mansfield had but thirty days to appeal. Therefore, Mansfield could not have been relying upon the presence of the United States as a party. Mansfield's attorney wrote to him prior to the expiration of the thirty day period:

> You should be aware that the rules of appeal for the United States Circuit Courts of Appeal, Appellate Rule 4(a) provide a thirty day period from the entry of judgment in which a Notice of Appeal may be timely filed. Failure to timely file the Notice of Appeal will result in the termination of your right to seek appeal as a matter of right.

Mansfield Petition, Exhibit E, p. 31.

This is not a case where a party was lulled into believing he had sixty days in which to appeal by the peripheral presence of the United States. Even after the thirty day period expired, new counsel for Mansfield did not assert a right to file a notice of appeal based upon the presence of the SEC in the action, but rather made a motion for an *extension* of time beyond the thirty day period based upon "excusable neglect." Mansfield did not raise the issue of whether the United States was a party until *after* SIPC and the trustee had filed a Joint Appellee's Brief on "excusable neglect" in the court of appeals. It is thus clear that Mansfield was not prejudiced in any way by any exception to a general rule, and that Mansfield's arguments based upon the right of litigants to "rely" upon a given rule (Mansfield Petition, p. 11-12) have no basis in fact in this case.

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[6] See Point II page 13, infra.

This case can be reduced to a very simple set of facts. The respondents were never given the opportunity to cross examine Mansfield as to the veracity of his allegations, nor was the court of appeals ever presented with a statement pursuant to Fed. R. App. Pro. 10(c).[7] Nevertheless, the only assertions which Mansfield really presents are the unproven allegations that (a) his attorney tried to contact him by letter to tell him that the thirty day period within which a notice of appeal must be filed was running and (b) that letter was not received by Mansfield. Under such circumstances, the first issue presented by Mansfield is not worthy of review by this court.

The case of *United States ex rel. Petrofsky* v. *Van Cott, Bagley, Cornwall, & McCarthy,* 588 F.2d 1327 (10th Cir. 1978), *cert. denied* ____ U.S. ____, 100 S.Ct. 77(1979), *rehearing denied* ____ U.S. ____, 100 S.Ct. 692 (1980) is relevant. There, an individual brought suit under a statute which requires the United States to either join or withdraw from the suit within sixty days. The United States withdrew, and plaintiff Petrofsky pursued the suit himself. The action was dismissed by the district court for failure to state a claim; Petrofsky did not file a notice of appeal until the sixtieth day after entry of the dismissal. Where "[a]ll parties were aware that the government disclaimed any participation in the suit," it was held that a notice of appeal must be filed within thirty days. The present case is strikingly similar. In *Petrofsky,* the government withdrew from the action within sixty days of the initiation of the action and took no role in the case thereafter. In this case, the government received *all* of the relief it had requested within sixty days of the initiation of the action, and took no role in the case thereafter. In both cases, the party which had failed to file the notice of appeal knew that the United States was not participating

[7] See p. 13, infra.

as a party. Further, it should be noted that in *Petrofsky* the appellant brought his appeal *pro se.*[8]

Mansfield Has Never Filed A Notice of Appeal

Finally, assuming solely for purposes of argument that the United States was a party to this action, one additional determinative fact remains: Mansfield has *never* filed a notice of appeal. If the United States were a party, Mansfield would have had sixty days from October 31, 1979, within which to file a notice of appeal. He did not do so. Mansfield has *yet* to file such a notice, as he admits at page 14 of his Petition. He did not file a notice of appeal with his *ex parte* application for an extension of time. Under such circumstances, the court may not grant an extension. *Selph* v. *Council of City of Los Angeles,* 593 F.2d 881, 882 (9th Cir. 1979). Nor can Mansfield's mere application for an extension of time itself be considered such a notice. *Dyotherm Corporation* v. *Turbo Machine Company,* 434 F.2d 65, 66 (3d Cir. 1970).

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[8] As an adjunct to his untenable "reliance" argument, Mansfield urges this court to determine the issues herein "not from the perspective of a seasoned federal practitioner but from the standpoint of an *in propria persona* layman. . . ." (Mansfield Petition, p. 13). First, as admitted by Mansfield, the notice of entry of the judgment was timely served upon his counsel thus making Mansfield's argument irrelevant to this case. *See* Mansfield Petition, Appendix E. Second, Mansfield himself hardly qualifies as an *"in propria persona* layman." As Mansfield has told this court in *Mansfield* v. *State Bar of California,* No. 80-1225, he is a law school graduate who has passed the written portion of the California Bar Examination. He has, however, been denied admission to the Bar of that state based upon a finding that he lacks "good moral character." Further, Mansfield has been "involved in extensive litigation involving at least 108 cases in the State Courts of California and in the Federal Courts." These facts are detailed in Appendix A and Appendix B to Mansfield's Petition for a Writ of Certiorari to the Supreme Court of the State of California, No. 80-1225. Under these circumstances, Mansfield can hardly be described as a "layman," and his argument is without merit.

II

THE QUESTION OF WHETHER MANSFIELD'S CONDUCT CONSTITUTED "EXCUSABLE NEGLECT" UNDER FED. R. APP. PRO. 4(a)(5) IS NOT WORTHY OF REVIEW BY THIS COURT

Mansfield makes a secondary argument that as a matter of law there was "excusable neglect" for his failure to file a notice of appeal within thirty days of entry of the order. As a consequence of certain of Mansfield's procedural errors, there is no record from which this court could determine excusable neglect. Therefore, Mansfield's petition should be denied.

Even if there were a proper record and even if the facts were as Mansfield recites them, there was no "excusable neglect." On the contrary, every case which has considered facts similar to those alleged (but never proven) by Mansfield has held that no "excusable neglect" exists.

Mansfield's Procedural Errors Make It Impossible To Review The Issue of "Excusable Neglect"

Mansfield filed his *ex parte* application for an extension of time after the expiration of the 30-day period set forth in Rule 4(a)(5). That Rule requires that:

> Notice of any such motion . . . shall be given to the other parties in accordance with local rules.

Mansfield *admits* failure to comply with this Rule in that his motion was made *ex parte*. The district court could not grant a motion for extension of time under such circumstances. *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.*, 193 F.2d 951 (9th Cir. 1952). The rationale of the *North Umberland* case has been described as "unassailable." *Plant Economy, Inc.* v. *Mirror Insulation Company*, 308 F.2d 275, 277 (3d Cir. 1962), and it has been followed in other circuits as well. *Cohen* v. *Plateau Natural Gas Co.*, 303 F.2d 273, 274 (10th Cir.

1962), *cert. denied*, 371 U.S. 825 (1962); *Merril Lynch, Pierce, Fenner & Smith, Inc.* v. *Kurtenback*, 525 F.2d 1179, 1182 (8th Cir. 1975); *Diffenderfer* v. *Homer*, 408 F.2d 1344, 1346 (5th Cir. 1969).[9] In light of the foregoing, the denial of Mansfield's motion for an extension of time was correct for procedural as well as substantive reasons.

In this connection it should be noted that because the hearing on Mansfield's petition for an extension of time was improperly *ex parte*, and because the court of appeals properly rejected Mansfield's attempt to augment the record before that court,[10] there was no record (and is no record) from which an appellate tribunal could conclude that Mansfield's neglect was excusable.

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[9] When a properly noticed motion is *filed* under Fed. R. App. P. 4(a)(5), it is not necessary for the court to *rule* prior to the expiration of the period. The final sentence of Fed. R. Civ. P. 4(a)(5) specifically provides that "no extension of time shall exceed 30 days past such prescribed time *or 10 days from the entry of the order granting the motion, whichever occurs later.*" (Emphasis supplied.) The Advisory Committee's Notes to Rule 4(a)(5) state that so long as the motion is timely *filed*, "the district court may act upon the motion at a later date. . . ." Mansfield could simply have filed his motion, and scheduled a hearing within the time provided in Local Rule 3(e)(1) of the United States District Court, Central District of California. *See, C-Thru Products, Inc.* v. *Uniflex, Inc.*, 397 F.2d 952, (2d Cir. 1968); 9 *Moore's Federal Practice* (2d ed. 1980) ¶ 204.13[2]. Furthermore, if Mansfield felt constrained to have a motion *on notice* heard in a shorter period than that prescribed by the local rule, both that rule and Fed. R. Civ. P. 6(d) allow a court order shortening the time. *See, Selph* v. *Council of the City of Los Angeles*, 593 F.2d 881, 883 (9th Cir. 1979).

[10] Mansfield never presented the court of appeal with a Statement of Evidence or Proceedings on the *ex parte* hearing pursuant to Fed. R. App. Pro. 10(c). His "motion to augment the record" was denied by Circuit Judge Ferguson by Order dated March 27, 1980.

Mansfield's first procedural error resulted in SIPC and the trustee having had no opportunity to challenge Mansfield's version of the facts. Mansfield's second procedural error makes it impossible for SIPC, the trustee, or this court, to determine what did in fact take place at the December 28, 1979 hearing.

Even Assuming The Facts Alleged By Mansfield Are True, Mansfield Has Made No Showing Of Excusable Neglect

(i) ***"Excusable Neglect" is Narrowly Construed***

Rule 4(a) gives the trial judge the authority, in his discretion, to extend the time for filing a notice of appeal only upon a showing of excusable neglect.[11] Hence, as the first step in determining whether to extend the time, the judge must decide whether excusable neglect has been

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[11] In 1979, the phrase "good cause" was added to Rule 4(a)(5). However, it is clear that an extension of time for "good cause" may only be had during the initial 30 days. The Committee Note of 1979 to Amended Subdivision (a) states that a showing of excusable neglect remains the appropriate standard in cases where, as here, the motion for an extension if made *after* the initial time for filing the notice of appeal has run. The "good cause" addition to the rule was made to fit:

> the situation in which the appellant could still file a timely notice of appeal but seeks extension of time within which he may file it, since at the time he requests the extension he has not neglected to do anything the rules required him to do. . . . Thus, despite a possible ambiguity in the text, undoubtedly the intention was to leave undisturbed the requirement that one who has failed to appeal within 30 days after entry of judgment . . . must show that his neglect to file his notice of appeal was excusable.

9 *Moore's Federal Practice* (2d ed. 1980) ¶ 204.13 [1.-2], text accompanying n.4. For the text of the Committee Note, see 9 *Moore's Federal Practice* (2d. ed. 1980) ¶ 204.01[4]. The notes are entitled to weight in ascertaining the meaning of the rules. *Mississippi Publishing Corporation* v. *Murphree*, 326 U.S 438, 444 (1946); *Selph* v. *Council of the City of Los Angeles*, 593 F.2d 881, 883, n. 1 (9th Cir. 1979).

shown; if it has not, he is without power to grant the motion. *Buckley* v. *U.S.*, 382 F.2d 611, 614 (10th Cir. 1967). The standard for determining what is excusable, and what is not, is a "strict" one. *Selph* v. *Council of the City of Los Angeles,* 593 F.2d 881, 883 (9th Cir. 1979).

The term "excusable neglect" in Fed. R. App. P. 4(a)(5) is one found throughout federal practice. Thus, the principles which govern a finding of excusable neglect under Fed. R. App. P. 4(a)(5), and its predecessor, Rule 73 of the Federal Rules of Civil Procedure, also govern a finding of excusable neglect under Bankruptcy Rule 802. *In re Butler's Tire & Battery Co., Inc.*, 592 F.2d 1028, 1033, (9th Cir. 1979). The concept of excusable neglect is also used in Rule 6(b)(2) of the Federal Rules of Civil Procedure as a basis for enlarging the time for certain filings. While the term is not defined in any of the aforementioned rules, case law provides a relatively clear test as to what constitutes excusable neglect. As the cases demonstrate, Mansfield's allegations, even if true, do not add up to a showing of such neglect.

The concept of "excusable neglect" was designed for the exceptional case, rather than "to cover any kind of garden-variety oversight." *Pasquale* v. *Finch,* 418 F.2d 627, 630 (1st Cir. 1969). A showing of mere carelessness or negligence does not constitute excusable neglect sufficient to warrant vacation of judgment. *Geigel* v. *Sea Land Service, Inc.* 44 F.R.D. 1, 2 (D.P.R. 1968). Counsel's oversight is not excusable neglect. *Nicholas-Morris Corporation* v. *Morris,* 279 F.2d 81, 83 (2d Cir. 1960); *Bullock* v. *Sterling Drug, Inc.*, 93 F. Supp. 371 (E.D. Pa. 1950). Administrative inadvertence or mistake in counsel's office does not constitute excusable neglect. *Airline Pilots Counsel No. 2* v. *Executive Airlines,* 569 F.2d 1174 (1st Cir. 1978).

(ii) Mansfield Has Made No Showing of Excusable Neglect

Mansfield's argument is based upon the premise that he, personally, failed to learn of the entry of judgment until the time for appeal had expired.[12] However, by Mansfield's own admission his counsel was notified of the entry of judgment almost immediately after the fact. See Mansfield Petition, p. 15, where it is stated: "[P]etitioner Mansfield's trial counsel received timely notice of the judgment entered on October 31, 1979." The Ninth Circuit had previously confronted this exact situation. *See Harlan* v. *Graybar Electric Co., Inc.* 442 F.2d 425 (9th Cir. 1971), and *In re Butler's Tire & Battery Co., Inc.*, 592 F. 2d 1028 (9th Cir. 1979). In *Harlan*, the court stated, with respect to Rule 4(a):

> Notice to appellant's counsel of the entry of the judgment constituted notice to appellant; hence he may not assert that he did not know and therefore that his failure to act was "excusable." *Howard* v. *Local 74, Wood, Wire and Metal Lathers International, et al.*, 208 F.2d 930 (7th Cir. 1953).

442 F.2d 425, 426.

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[12] As noted above, the hearing on "excusable neglect" was held *ex parte*, and no cross-examination was possible as to whether Mansfield did have personal knowledge. However, in a post trial discovery proceeding, Mansfield submitted a declaration under penalty of perjury dated June 19, 1980, a copy of which is annexed as Appendix A. While the respondents do not acknowledge the veracity of Mansfield's declaration, he *admitted* therein that he had personal knowledge of the outcome of the case within thirty days of the entry of judgment on October 31, 1979:

> My attorney, Mr. Harold Tomin, told me on or about November 19, 1979, that claims against Securities Investor Protection Corporation had been decided against me and that another case he was handling for me had been lost.

It appears that there is a substantial likelihood that the entire premise of Mansfield's "excusable neglect" argument is false.

The Ninth Circuit followed the rationale of the *Harlan* case explicitly in *Butler*. There, an attorney who failed to file a timely notice of appeal claimed his neglect was excusable because his client's president, whose decision it was whether or not to appeal, was out of the state during the entire appeal period. The Court held that "notice to appellant's counsel constituted notice to appellant," and refused to hold the neglect excusable. 592 F.2d 1028, 1033. The result is the same in other circuits. *Winchell* v. *Lortscher,* 377 F.2d 247 (8th Cir. 1967). Where counsel receives actual notice of the entry of judgment, mere carelessness or the mishandling of mail will not justify extending the time to appeal. *Pasquale* v. *Finch,* 418 F.2d 627, 630 (1st Cir. 1969).

It is basic to the attorney-client relationship that notice to one's counsel is imputed to the party. A client is considered to have "notice of all facts, notice of which can be charged upon the attorney." *Link* v. *Wabash Railroad Company,* 370 U.S. 626, 634 (1962); *Smith* v. *Ayer,* 101 U.S. 320 (1880); *Mansour* v. *Reeves Buildings, Inc.,* 383 F.Supp. 482, 484-5, aff'd, 504 F.2d 812 (4th Cir. 1974). *See also, N.L.R.B.* v. *Tri-City Linen Supply,* 579 F.2d 51, 55 (9th Cir. 1978). The present case is in all respects similar to *Howard* v. *Local 74, Wood, Wire and Metal Lathers International,* which held that:

> notice to counsel is notice to all parties represented by him. The failure of any interested party to receive actual notice is due solely to neglect of plaintiffs and their counsel
>
> For the foregoing reasons, we hold that no "excusable neglect" . . . is shown. . . .

208 F.2d 930, 934.

In short, Mansfield has presented no rationale for his position, nor has he cited any authority whatever, to

demonstrate that his alleged actions constitute "excusable neglect" in failing to file a timely notice of appeal. The issue is simply not worthy of review by this court.

CONCLUSION

This Court should deny Mansfield's Petition for a Writ of Certiorari.

Dated: September 11, 1981

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APPENDIX

APPENDIX A

DECLARATION OF ALLEN MANSFIELD

I, ALLEN MANSFIELD, am the Claimant in this case and do respectfully state:

My attorney, Mr. Harold Tomin, told me on or about November 19, 1979 that the claims against Securities Investor Protection Corporation had been decided against me and that another case he was handling for me had been lost. Mr. Tomin had been paid $20,000 ($10,000 for each case) in advance on the two cases, and when he requested a large sum for handling the two appeals, I requested that he withdraw from the cases.

Despite my repeated efforts to send an employee and my son for the files, Mr. Tomin would not release them until November 30, 1979 after 4:30 P.M., which was the 30th day after entry of judgment. Affidavits of the individuals concerned are on file with the appeal briefs.

I have requested Mr. Tomin to file the proper substitution of attorney to be relieved as attorney, but as yet he has not signed a proper substitution, despite repeated requests. On May 27, 1980 I wrote to him with a request to sign the substitution, but as yet have received no response from him. On June 3, 1980 I employed a new attorney, Mrs. Shirley Warren.

Mr. Tomin has since November 30, 1979 refused to talk to me, receive my calls, or return my calls. He further did not mail to me the notice of debtor's exam or subsequent papers.

My home and only business has been in Honolulu, Hawaii for a period of almost two years and the address has been properly noticed and provided to opposing counsel. The last four legal mailings from the office of Mrs. Aulana L. Peters and Mr. Daniel M. Kolkey of Gibson, Dunn & Crutcher have also been sent to my former home at 3928 Carmona Avenue in Los Angeles, and each time I have notified their offices of the mistake. I received in Honolulu a copy in the mail for the notice of debtor's exam noticed for April 2, less than a week before the scheduled date and at once called the Clerk of the

Federal District Court in Honolulu. He told me that my debtor's exam must be taken in Hawaii and that the proper method was to prepare certain documents in Los Angeles and have them certified by the Court and a fee of $3.00 paid.

The Federal Clerk then told me that these documents needed to be filed in Honolulu and served on me and that the exam could be held there within the proper distance from my residence. I then called the Federal Clerk in Los Angeles, and talked to both Mrs. Nancy Miller and Ms. Debbie Gutbeir, who repeated the same information. They all stated that the notice served by mail for a debtor's exam 2,500 miles away was *not* proper service.

I then called two experienced attorneys in Honolulu, who informed me that the rules could conceivably be different in Los Angeles, but that they felt that the service for a debtor's exam was not proper and was null and void. I further was involved in complicated legal matters in Honolulu that could not have been changed at that date without serious damage because of the legal actions of the Hawaiian legislature.

I called the attorney noticing the debtor's exam, a Mr. Daniel A. Kolkey, several days prior to the scheduled exam, but was unable to reach him. I then called attorney Tracey Guerin who was engaged in December 1979 to handle the appeal of the case. She called Mr. Kolkey to attempt to schedule a later date for the exam and to tell him that the service was not proper according to the District Court procedure. She also told him I would accept service at a later date if they would pick a date when I could come.

Ms. Guerin did not reach me until after the date, but informed me that Mr. Kolkey refused to change the date in any respect and refused to consider the matter as to whether the service was proper. She further stated that after the exam he stated that he would reschedule the deposition at a later date if he was paid $50.00 as reporter's costs.

Before the motion to compel debtor's exam, I called Mr. Kolkey long distance on two occasions, but he was on vaca-

tion and I was told to contact Mr. Washton. I called Mr. Washton on three occasions, but he was out sick one day and tied up on the other two occasions. I did talk to his secretary and told her that I would make myself available on a convenient date for them if they would simply schedule a date when I had to come to Los Angeles for other reasons.

I further have informed Mr. Kolkey that I am being forced to liquidate all interests in Hawaii and will be living in Los Angeles in approximately two months.

The cost of flying to Los Angeles including transportation at both ends without even staying overnight is almost $500.00 with the current lower fares, and is more than this under the fares in force for the time of the original deposition. I am deeply in debt and am in danger of writing bad checks to pay travel expenses of this type.

The present case has cost over $40,000 in legal fees, plus many times this amount of my time, and has occupied over seven years. At the present time the appeal has not even been accepted. For the year prior to trial and up to the date of trial, Gibson, Dunn and Crutcher offered to settle the case for over $200,000, payable to my children, with no claim at all against me. The present judgment would rule a complete non-suit as to any claim of myself or the six children, or the other entities, and would impose judgment of over $180,000 against me.

In January, 1979, at the suggestion and request of Mr. Washton, the attorney for Gibson, Dunn and Crutcher, I made an offer of settlement addressed to his office which would have represented a payment to my six children of the previously offered amount of $225,000 and with no claim against me.

The Court has not previously been apprised of all these facts and I feel they are of great importance in the consideration of whether I acted improperly in the matter of the debtor exam.

I declare under penalty of perjury that the foregoing is true and would so testify if called as a witness in Court.

Executed this 19th day of June at Los Angeles, California.

ALLEN MANSFIELD
Allen Mansfield